

1 Terry W. Bird - State Bar No. 49038
twb@birdmarella.com
2 Jason D. Kogan - State Bar No. 107707
jdk@birdmarella.com
3 John M. McCoy III - State Bar No. 166244
jmm@birdmarella.com
4 BIRD, MARELLA, BOXER, WOLPERT,
NESSIM, DROOKS & LINCENBERG, P.C.
5 1875 Century Park East, 23rd Floor
Los Angeles, California 90067-2561
6 Telephone: (310) 201-2100
Facsimile: (310) 201-2110

7 Attorneys for Defendant Kenneth Ketner
8

9 **UNITED STATES DISTRICT COURT**
10 **CENTRAL DISTRICT OF CALIFORNIA, SOUTHERN DIVISION**
11

12 UNITED STATES OF AMERICA,

13 Plaintiff,

14 vs.

15 KENNETH KETNER,

16 Defendant.

CASE NO. SA CR-05-36JVS

**SENTENCING MEMORANDUM
OF DEFENDANT KEN KETNER**

Date: July 2, 2007

Trial Date: May 30, 2006

TABLE OF CONTENTS

	<u>Page</u>
I INTRODUCTION	1
II BACKGROUND	6
A. Mr. Ketner's Background and The Significant Deficits That Have Contributed To His Poor Judgment.	6
B. The Offense Conduct	9
C. Other Conduct	12
D. Mr. Ketner's Current Circumstances	14
E. Mr. Ketner's Service To The Community, Friends, And Family	16
F. Character Letters.	16
G. Mr. Ketner's Substantial Mitigation And Cooperation Efforts Since MCR's Collapse.	17
III SENTENCING ANALYSIS	18
A. Sentencing Guidelines Calculation Per The Plea Agreement.	19
B. The PSR Ignores The Plea Agreement, Misconstrues The Facts, And Misapplies The Law.	21
1. Contrary to the Government's Stipulation, the PSR Improperly Applies a Four-Level Increase Under 2F1.1(b)(7)(B) (Offense Affecting Financial Institution And Defendant Individually Received \$1 Million)	22
2. Contrary to the Government's Stipulation, the PSR Improperly Applies a Four-Level Increase Under § 3B1.1(a) (Organizer/Leader).	24
3. The PSR's Calculation Of The Amount Of Loss Is Without Sufficient Basis, Is Contrary To Government's Position, And Is Wrong.	26
4. Contrary to the Government's Stipulation, the PSR Improperly Applies a Two-Level Increase Under § 3B1.3 (Abuse of Trust)	26
IV CONCLUSION	29

TABLE OF AUTHORITIES

		<u>Page</u>
	<u>Federal Cases</u>	
4	<i>Bockting v. Bayer</i> , 399 F.3d 1010 (2005)	22
6	<i>Crawford v. Washington</i> , 541 U.S. 36 (2004).....	22
7	<i>Lilly v. Virginia</i> , 527 U.S. 116 (1999).....	22
9	<i>United States v. Andrews</i> , 447 F.3d 806 (10th Cir. 2006)	19
10	<i>United States v. Booker</i> , 543 U.S. 220 (2005).....	18, 19
12	<i>United States v. Bortnick</i> , 2006 WL 680544 (E.D. Pa. 2006).....	23
13	<i>United States v. Broderson</i> , 67 F.3d 452 (2d Cir. 1995)	28
15	<i>United States v. Castellano</i> , 349 F.3d 483 (7th Cir. 2003)	23
16	<i>United States v. Colton</i> , 231 F.3d 890 (4th Cir. 2000)	23
18	<i>United States v. Gonzalez-Huerta</i> , 403 F.3d 727 (10th Cir. 2005).....	18
19	<i>United States v. Huckins</i> , 53 F.3d 276 (9th Cir. 1995)	21, 22
21	<i>United States v. Lopez-Flores</i> , 444 F.3d 1218 (10th Cir. 2006).....	19
22	<i>United States v. Mares</i> , 402 F.3d 511 (5th Cir. 2005)	18
24	<i>United States v. Millar</i> , 79 F.3d 338 (2d Cir. 1996)	23
25	<i>United States v. Thorn</i> , 317 F.3d 107 (2d Cir. 2003)	28
27	<i>United States v. Trujillo-Terrazas</i> , 405 F.3d 814 (10th Cir. 2005).....	19

Federal Statutes

1		
2	18 U.S.C. § 1343.....	1
3	18 U.S.C. § 1957.....	1
4	18 U.S.C. § 3553.....	5, 19
5	U.S.S.G. § 2F1.1	19, 23, 24
6	U.S.S.G. § 3B1.1.....	19
7	U.S.S.G. § 3B1.3.....	26
8	U.S.S.G. § 3D1.4	20
9	U.S.S.G. § 5H1.3	5
10	U.S.S.G. § 5H1.4	5
11	U.S.S.G. § 5H1.5	5
12	U.S.S.G. § 5H1.7	5
13	U.S.S.G. § 5H1.11	5
14	U.S.S.G. § 5H1.12	5

15
16
17
18
19
20
21
22
23
24
25
26
27
28

I

INTRODUCTION

Defendant Ken Ketner comes before this Court having pled guilty to one count of wire fraud in violation of 18 U.S.C. § 1343 and a related count of money laundering in violation of 18 U.S.C. § 1957. These convictions stem from Mr. Ketner's involvement in fraudulent mortgage lending practices during the year 2000.

Mr. Ketner acknowledges that he has committed serious crimes. He has admitted this and he recognizes that he should and will be punished for what he has done. By raising the issues discussed in this memorandum and by attempting to place his offense conduct in proper context, Mr. Ketner in no way intends to evade responsibility for what he did or to minimize the seriousness of his offenses. He signed the plea agreement and admitted his guilt in open court because he is in fact guilty. Mr. Ketner does not expect to, and certainly is not attempting to, avoid the consequences of his actions.

Mr. Ketner's plea had a transformative impact on his life. Faced with the reality of his past actions, Mr. Ketner has come to grips with more than his incarceration. The self-reflection necessitated by his plea has required him to proactively deal with his alcoholism, parental abandonment, mental and cognitive disabilities, as well as his bad acts. He now spends much of his considerable energies on both self-rehabilitation and community service. While he has always served as a supportive father figure for his children, now he is honest with them about his mistakes and criminal behavior. None of this transformation is offered to excuse prior bad acts. It is addressed, however, to provide a perspective which is required by the law, ignored by the government, and inadequately explored in the Pre-Sentence Report ("PSR"). Most importantly, these perspectives provide the Court with confidence that the Defendant's sentence can effect positive rehabilitation and not just serve society's need for vengeance or conformity.

1 It is respectfully suggested that in addition to Mr. Ketner's acknowledgement
2 of wrongdoing there are six other factors that should weigh heavily on the Court's
3 sentencing decision.

4 First, the Court's sentencing determination should be guided by the
5 conclusions and factual stipulations reflected in the July 15, 2006, Plea Agreement,
6 which the Government reached after investigating and litigating this case for well
7 over five years. This has been a complicated case, with multiple parties engaged in
8 a number of types of misconduct. Over the course of five years, the government
9 investigated the case, interviewed scores of witnesses, and reviewed thousands of
10 documents. Notwithstanding the length and size of this investigation, the
11 government has admitted that it still left significant portions of the original record
12 unreviewed.¹ After all of this investigation, the government came to certain
13 conclusions relative to Mr. Ketner, conclusions that differ significantly from the
14 PSR. For example, the government concluded that others in MCR participated in
15 misconduct and that Mr. Ketner does *not* deserve a four-level "organizer/leader"
16 adjustment. Given the complexities of this case and the intensity at which it was
17 litigated, the conclusions agreed upon and memorialized in the Plea Agreement
18 should carry great weight. Indeed, if not for the factual and legal conclusions
19 embodied in the plea agreement, this case could not have been resolved short of a
20 lengthy, time consuming trial.

21 Second, the instant plea and sentencing is the direct result of Mr. Ketner's
22 confronting psychological and physical impairments with which he has lived
23 throughout his life. These impairments are rooted in childhood diseases, physical
24

25 ¹ The government admitted to this Court that it had not reviewed some 300 boxes
26 of original MCR documents reflecting the transactions at issue in this case. The
27 government also admitted the importance of these documents. Specific examples of
28 what was found in these documents are discussed below and in the Laffer Report.

1 handicaps, abandonment by each of his parents, fluctuating mood disturbances, and
2 mental disorders. The impact of these challenges has manifested itself in self-
3 destructive conduct including alcoholism, which in turn led to organic impairment to
4 Mr. Ketner's short-term memory and attention to detail. These serious and
5 observable conditions are now professionally diagnosed and discussed below and in
6 the attached reports.

7 The government has given *no* consideration to these conditions and
8 apparently has chosen to wholly discount or purposely ignore their existence and
9 impact on Mr. Ketner. This is understandable given the government's consistently
10 cynical and dismissive view of Mr. Ketner. While the Probation Office has
11 acknowledged and reported some of these conditions, it has expended a wholly
12 inadequate amount of effort in assessing the connection between these conditions
13 and Mr. Ketner's actions and efforts towards rehabilitation.

14 Third, the Court should give little weight to the untested and unsupported
15 "facts" set forth in the PSR and in the government's position in asking the Court for
16 the high end of the plea agreement. Just as the facts should not be unfairly
17 construed to minimize Mr. Ketner's culpability, neither should they be unfairly
18 construed to overstate it. The Court's determination of the appropriate sentence in
19 Mr. Ketner's case should take into account certain demonstrable and
20 incontrovertible facts that illuminate exactly what happened here. These
21 demonstrable facts are set out below and in the report and exhibits prepared by
22 Martin G. Laffer, which is attached hereto as Exhibit A.²

23 Fourth, Mr. Ketner has demonstrated his contrition through extraordinary
24 efforts to make amends for his wrongdoing. In the course of trial preparation, Mr.
25 Ketner uncovered significant evidence of ongoing criminal conduct in other,
26 _____

27 ² All references to the Laffer Report Exhibits are noted as "Laffer Exhibit(s)."
28

1 unrelated matters involving persons who would have been called to testify against
2 him. Mr. Ketner produced that information to the FBI, which confirmed that the
3 information is of value. Other evidence of ongoing criminal activity by persons
4 unrelated to Mr. Ketner's case has also been produced to the government. While
5 there is no § 5K agreement in this matter, Mr. Ketner has produced this information
6 to demonstrate his intention to fully cooperate with law enforcement and to
7 demonstrate his intention to properly put this conduct behind him.

8 Fifth, as acknowledged by the government, Mr. Ketner has now fully
9 complied with his plea-agreement obligations concerning taxes. In fact, Mr. Ketner
10 has never acted in bad faith as to this obligation. His filing was late, however, he
11 subsequently expended extraordinary efforts to assure the Court and the government
12 that he would do even more than was required of him as to the payment of taxes.
13 He did this notwithstanding the initial good faith advice of his tax consultants who
14 recommended to him that once his filings were made, payment of the precise
15 amount of taxes due and owing could and would have to be negotiated with the IRS.
16 Moreover, rather than litigate over the ambiguous and poorly drafted language in the
17 plea agreement related to the tax issue, Mr. Ketner elected to borrow significantly in
18 order to avoid extended and distracting litigation with the government as to the
19 original intent of the provisions dictated by the government. That language was
20 negotiated in the context of Mr. Ketner's personal taxes and was never understood
21 by his counsel or Mr. Ketner to include contested liability for the corporate taxes
22 referred to in the government's brief. Thus, in order to demonstrate his good faith
23 and willingness to go beyond his obligations, Mr. Ketner not only has incurred
24 significant debt, he also has prepaid taxes for liability which is demonstrably not his.
25 The government has acknowledged that there has been no breach. Predictably,
26 however, it has erroneously sought to discount and distort Mr. Ketner's actions and
27 intentions.

1 Sixth, the Government's sentencing memorandum makes sweeping
2 accusations regarding conduct outside the scope of MCR ranging from the early
3 1980s until literally just a few weeks ago. The common denominator of all of these
4 allegations is that they are just that – untested allegations. While the Court may fix
5 a sentence within the guidelines range based on any available evidence, it is unfair
6 for the Government to simply throw mud against the wall in the hopes that some
7 will stick. And that is exactly what is happening here. As shown below, many of
8 the Government's assertions are, firstly, based on nothing more than an unverified
9 statement of an individual, often an individual with significant exposure and, thus,
10 an ax to grind. Secondly, as also shown below, many of the assertions are simply
11 and demonstrably wrong.

12 Even under the Guidelines, fixing a sentence within a range is supposed to
13 take into account all aspects of the offense conduct and of the defendant himself.
14 See U.S.S.G. Ch.5, Pt.H, intro. comment. Among others, these include factors such
15 as mental and emotional conditions, *see* U.S.S.G. § 5H1.3, substance abuse, *see id.*,
16 § 5H1.4, employment history, *see id.*, § 5H1.5, role in the offense, *see id.*, § 5H1.7,
17 record of good works, *see id.*, § 5H1.11, and evidence of a disadvantaged
18 upbringing, *see id.*, § 5H1.12. Moreover, now that the Guidelines are advisory, the
19 factors from 18 U.S.C. § 3553 are especially relevant. Specifically, § 3553(a)(1)
20 *mandates* consideration of “the history and characteristics of the defendant.”

21 Despite these statutory and Guidelines mandates, the Government makes no
22 effort at all to take into account the undisputed facts regarding Mr. Ketner's
23 upbringing, background, current mental condition, or good works, including Mr.
24 Ketner's efforts to assist law enforcement. Even the Probation Office changed its
25 recommendation based on these considerations. The Government, on the other
26 hand, ignores them entirely, choosing instead to spend the hundreds of pages in its
27 sentencing memorandum and attachments repeating accusations that it never even
28 bothered to investigate. Nowhere in those hundreds of pages does the government

1 even mention Mr. Ketner's upbringing, his diagnosed neuropsychological
 2 impairments, his substance abuse, his good deeds in the community, or his efforts to
 3 provide information to law enforcement.

4 As will be shown below, outside of the offense conduct, much of what is in
 5 the Government's memorandum can be easily shown to be wrong. And even much
 6 of the Government's assertions regarding the offense conduct itself is wrong too.
 7 But what is not in the memorandum is also very informative. The Government's
 8 complete failure to address the factors that guide sentencing within the range speaks
 9 loudly about the extent to which the Government's memorandum is even intended to
 10 present a full and fair portrayal of Mr. Ketner for sentencing purposes. The Court
 11 should bear this in mind when it considers that memorandum's advice.

12 II

13 BACKGROUND

14 A. Mr. Ketner's Background and The Significant Deficits That Have 15 Contributed To His Poor Judgment.

16 An exhaustive report prepared by Dr. Sheila Balkan provided a critical
 17 overview of Mr. Ketner's background, the extraordinary challenges he has faced,
 18 and how they relate to the offense conduct. This report also summarizes the results
 19 of several others who have evaluated or treated Mr. Ketner, including psychologists,
 20 psychiatrists, addiction specialists, and others³. We will not repeat all of the Balkan
 21

22
 23 ³ The professionals who have recently evaluated or treated Mr. Ketner include
 24 Richard Romanoff, Ph.D., who is frequently appointed to do psychological
 25 assessments for the District Court; Annette L. Ermshar, Ph.D., who does evaluations
 26 for the San Bernardino County Superior Court system; Joseph S. Haraszti, M.D., an
 27 psychologist who is former Deputy Probation Officer; and Robert W. Timmons, an
 28 addiction specialist.

1 Report's analyses and conclusions here, however, certain conclusions are worth
2 addressing.⁴

- 3 • When he was about six years old, Mr. Ketner contracted Legg-Calve
4 Perthes disease, a degenerative disease of the joints that left him in a
5 wheelchair and unable to walk.
- 6 • Mr. Ketner's parents separated before he was a year old and he was
7 initially raised by his mother. When Mr. Ketner was eight years old,
8 his mother simply left him in his wheelchair in a hotel room in south
9 Los Angeles, whereupon Mr. Ketner went to live with his father and
10 stepmother. But Mr. Ketner's father's alcohol abuse led to his
11 abandoning Mr. Ketner about three years later when Mr. Ketner was
12 eleven.
- 13 • Despite these challenges, Mr. Ketner taught himself to walk again and
14 managed to get along in school until about the eighth grade. At that
15 point, Mr. Ketner's stepmother moved from Covina to Alta Loma and
16 Mr. Ketner had trouble fitting in with his new classmates. It was about
17 this time that he started abusing alcohol. This abuse continued for the
18 next 40-odd years.
- 19 • As the Balkan report summarizes and as the reports of the other doctors
20 specify, Mr. Ketner suffers from several organic neurophysiological
21 impairments. In addition to depression and severe ADHD, he suffers
22 from cyclothymia, which is characterized by severe, chronic fluctuating
23 mood disturbances similar to bi-polar disorder. It is common for
24 sufferers of cyclothymia to engage in substance abuse as an effort to
25

26 ⁴ A complete copy of the Balkan Report, which includes reports by the other
27 specialists, is attached as Exhibit B.
28

1 self-medicate.⁵

- 2 • It is the opinion of the various doctors and specialists who have
- 3 diagnosed and treated Mr. Ketner that, first, Mr. Ketner's impairments
- 4 result from his traumatic childhood. For example, Dr. Richard
- 5 Romanoff states "I believe that Mr. Ketner's core psychological
- 6 difficulties . . . is most likely the result of his exposure to an unusually
- 7 traumatic childhood." Second, these experts conclude that Mr.
- 8 Ketner's substance abuse is both a result of as well as an aggravating
- 9 factor of his impairments. Finally, these experts conclude that Mr.
- 10 Ketner's impairments, along with his substance abuse, contributed to
- 11 his bad judgment in relation to the facts at issue here. For example, Dr.
- 12 Romanoff states: "I believe that the combination of difficulties noted
- 13 above directly contributed to significantly and seriously undermining
- 14 his competency to handle many of the complexities associated with his
- 15 business." And Dr. Annette L. Ermshar concludes that as a result of his
- 16 organic impairments, "one can expect [Mr. Ketner] to exhibit poor
- 17 reasoning, impulsive behaviors, emotional lability [i.e., instability], and
- 18 impaired problem solving skills."

19 Again, it must be made completely clear that Mr. Ketner does not claim that
 20 his difficult upbringing and current conditions excuse his conduct. On the contrary,
 21 Mr. Ketner has admitted his guilt and recognizes his culpability for his actions.
 22 However, as he stands before the Court to be sentenced, the Court deserves to know
 23 the influences that affected Mr. Ketner and the influences that, while not excusing
 24 his conduct, indisputably played a role in it.

25
 26 ⁵ Mr. Ketner is currently under the care of a psychiatrist, Dr. Joseph S. Haraszti,
 27 who has prescribed several medications to treat Mr. Ketner's cyclothymia.
 28

1 **B. The Offense Conduct**

2 Mr. Ketner has acknowledged his wrongdoing by pleading guilty to counts
 3 Nine and Sixteen of the indictment. As stated in the indictment, between May and
 4 August 2000, Mr. Ketner participated with others at MCR – including co-defendant
 5 Allen Johnson – in a scheme to divert loan proceeds intended for specific residential
 6 loans to fund other obligations. Plea Agreement pages 6-15; Indictment ¶ 33. In
 7 effect, the defendants engaged in a misguided Ponzi scheme designed to keep MCR
 8 afloat during this three-month period. Again, Mr. Ketner acknowledges and does
 9 not shirk from admitting the life-altering error in judgment that led him to
 10 voluntarily participate in this misconduct.

11 In order to place Mr. Ketner's conduct in proper context, the Court is
 12 respectfully directed to the Laffer Report. In that report, Mr. Laffer summarizes the
 13 evidence establishing that Mr. Ketner's activities in relation to the warehouse
 14 lenders was different from a typical scenario. Specifically, Mr. Laffer discusses the
 15 evidence showing that certain people within the warehouse lenders were aware of
 16 much of what Mr. Ketner and others at MCR were doing. For example, employees
 17 at Household Bank were given documents showing that MCR was disbursing
 18 mortgage checks to borrowers. While it may be true that certain higher level
 19 management at the bank were unaware of this, it is just as true that Mr. Ketner dealt
 20 with vice-presidents and other people at the bank who emphatically knew about it.⁶
 21 Obviously, this fact is important in order to understand the context in which Mr.
 22 Ketner acted. The Laffer Report at pages 228-29 outlines the evidence establishing
 23 that the warehouse lenders knew that MCR controlled the disbursement of the
 24 _____

25 ⁶ Household is currently in litigation with its insurance carrier over the extent of
 26 Household employees' shared responsibility for the losses at issue here.
 27 Accordingly, Household has a clear interest in "spinning" certain facts, such as
 28 whether any of its employees knew about what Mr. Ketner was doing.

1 warehouse funds directly, and learned that MCR checks written to borrowers were
2 returned NSF.

3 As more fully discussed in the Laffer Report, Mr. Ketner was not in charge of
4 MCR's day-to-day operations and cash flow in the period leading up to the offense
5 conduct. Rather, Mr. Ketner had focused his energies and attention – which were
6 limited by his documented cognitive deficiencies and alcoholism – to the launching
7 of a new venture, known as "Home FN" or "Home ZipR." By early 2000, Mr.
8 Ketner was not even a corporate officer of MCR.

9 Unbeknownst to Mr. Ketner, other individuals affiliated with MCR –
10 primarily Val Benicosa and Randy Bristol began diverting funds intended for MCR
11 loan accounts to their personal and corporate uses. Mr. Ketner eventually learned of
12 the devastating problems occasioned by these unauthorized diversions of funds, he
13 devoted himself to attempting to salvage MCR's ability and enabling it to meet its
14 financial obligations. He infused substantial personal funds *into* MCR and also
15 signed a personal guarantee of MCR's obligations to Household.

16 However, Mr. Ketner made a critical – and unlawful – error of judgment. In
17 order to meet MCR's funding obligations to the warehouse lender, he authorized the
18 use of loan proceeds on newer loans to pay off the obligations on older loans. In so
19 doing, he hoped to keep MCR operating, and its obligations satisfied, until a
20 financial recovery could be achieved. This misapplication of funds was illegal,
21 which is why Mr. Ketner has pleaded guilty and agrees that he should be punished.

22 But as discussed more fully elsewhere, it would be manifestly unfair to base
23 Mr. Ketner's sentence on other – unproven and inaccurate – factual allegations not
24 supported by the plea (or any reliable evidence).

25 Notably, however, the bulk of the government's memorandum and the PSR
26 have nothing to do with this misconduct. Instead, they postulate various *other*
27 alleged misconduct, none of which is supported by substantial evidence – and
28 indeed is *refuted* by the only reliable evidence.

1 For example, the government discusses at length a so-called “straw buyer
2 scheme” involving what have been referred to as the “purple loan files.” But the
3 government’s distorted characterization of the purported “straw buyer” transactions
4 is contrary to the evidence. As established conclusively in the exhaustive expert
5 analysis of CPA Martin Laffer and the evidence summarized therein, there simply
6 were no “straw buyers.”⁷

7 The “purple file” transactions were short-term sales of residential real estate
8 purchased and resold by employees and affiliates of MCR. While such transactions
9 can be aggressive and financially risky, they involved no “straw buyers” and no
10 fraud. Each such transaction involved a real purchaser, and most critically the
11 nature of the transactions was disclosed to and sanctioned by the lender. Laffer
12 Report at 28-29. Indeed the Laffer report discusses contemporaneous faxes sent to
13 the lenders expressly describing these transactions as “corporate flips” for “KK,”
14 namely Ken Ketner.

15 As noted above, the government also suggests that Mr. Ketner participated in
16 a “straw buyer scheme” to “defraud” MCR’s warehouse lenders. But the evidence
17 clearly shows that there *were* no straw buyers, and that the transactions in question
18 were accurately described to the lenders.

19 Finally, the government greatly exaggerates Mr. Ketner’s role in the wrongful
20 conduct at MCR while minimizing the roles of others. This is not surprising given
21 that the government has relied almost entirely on unsworn, self-serving hearsay
22 statements from other participants who already had a strong incentive to minimize
23 their own responsibility.

24 _____
25 ⁷ Indeed, the Probation Office has now conceded that the “purple file” transactions
26 are more accurately described as “non-arms-length” rather than fraudulent, and that
27 the nature of the transactions was disclosed to the lenders. See May 14, 2007
28 Second Addendum To The Presentence Report, at p. 3.

1 In sum, Mr. Ketner is fully prepared to have this Court impose a sentence
2 based on Mr. Ketner's undeniable responsibility for the misconduct he actually
3 engaged in at MCR. He simply urges the Court to base the sentence on that
4 conduct, not on unproven conduct falsely attributed to him.

5 **C. Other Conduct**

6 While the Government's Sentencing Memorandum is remarkably thin on
7 several very important issues, such as Mr. Ketner's background and circumstances,
8 it spends much time making allegations beyond the scope of the plea agreement and
9 beyond the activities at MCR. Unfortunately, most of these allegations are nothing
10 more than unsupported and unconfirmed accusations. They are demonstrably
11 untrue.

12 For example, the government begins its litany of accusations by parroting an
13 accusation purportedly made by Tami Ruffoll, who supposedly worked with Mr.
14 Ketner at GMAC Mortgage in "the early 1980s(!)." The government claims that
15 Ms. Ruffoll claims that Mr. Ketner told her to commit fraud while they worked
16 together and the government uses this assertion as part of its claim that Mr. Ketner
17 deserves the high end of the range.

18 Several problems are evident with this: First, the government admits that it
19 has no evidence corroborating Ms. Ruffoll's story. Indeed, the government claims
20 nothing more than Ms. Ruffoll's say-so; it didn't even try to corroborate it. Second,
21 Ms. Ruffoll was a "walk-in," namely a person who called the government one day
22 after hearing about Mr. Ketner in the media. Such witnesses are notoriously
23 unreliable. Third, the alleged incident supposedly took place in the "early 1980s,"
24 over 25 years ago! Even if Ms. Ruffoll were acting in good faith, she could easily
25 be mistaken about something that happened so long ago.

26 And indeed she is: In fact, Mr. Ketner never even worked at GMAC in the
27 "early 1980s." He worked there from 1984 to 1986. And more importantly, Mr.
28 Ketner was never terminated by GMAC for committing fraud. In fact, Mr. Ketner

1 sued GMAC over the termination and *GMAC paid him \$175,000 in damages.*⁸ Ms.
 2 Ruffoll's story is just wrong. It is probably a mixture of false memory, speculation,
 3 and imagination, but wrong nevertheless. She, of course, bears no blame for
 4 contacting the government. But the government, on the other hand, should do better
 5 than to merely parrot every (possibly wrong) allegation that it hears. Unfortunately,
 6 its sentencing memo does just this.

7 Another example of the government's assertion of demonstrably wrong facts
 8 involves the claim regarding CFC Mortgage. The government claims that a witness,
 9 Roberta Martin, said that Mr. Ketner was involved with fraudulent loans while he
 10 was the head of CFC. Specifically, the government claims that Ms. Martin said that
 11 the Department of Housing and Urban Development "conducted an audit and
 12 discovered that many of CFC's HUD insured loans were fraudulent." But once
 13 again, while Ms. Martin may indeed have said this, her accuracy deserves to be
 14 investigated. And such investigation involves nothing more than checking the HUD
 15 records regarding the audit. But the government apparently couldn't be bothered.

16 The records of the audit reveal that HUD concluded that certain loans did not
 17 meet HUD guidelines. *But there was no allegation, much less a finding of fraud.*
 18 Once again, it is possible that Roberta Martin is mistaken. This excuses her but it
 19 does not excuse the government which ought to have something more than a bare
 20 unproven allegation before making accusations like those it asserts here.

21 At this stage of the proceedings, unless the Court were inclined to hold
 22 evidentiary hearings, it is simply impossible for Mr. Ketner to rebut every single
 23 allegation made in the Government's sentencing memorandum. As shown, some
 24 are easily proved entirely false. Others, however, are just as false but take longer to
 25

26 ⁸ The lawsuit was *Ketner v. GMAC Mortgage Corp.*, Riverside County Superior
 27 Court, Case No. 185461. Even before it settled, neither party ever made any
 28 allegations of fraud.

1 prove because they require closer analysis of accounting records or other
2 information.

3 For example, the Government makes sweeping accusations of bankruptcy
4 fraud. And it is worth noting again that these are nothing more than accusations; the
5 issue of bankruptcy fraud was never included in the indictment and has never been
6 litigated. While it is beyond the scope of a sentencing memo to litigate the accuracy
7 of these accusations, certain facts are easily proved wrong and they demonstrate the
8 unreliability of the entire accusation.

9 For example, the government asserts that Mr. Ketner sold certain "purple file"
10 properties "without consulting" with their "titular" owners. Gov. Sentencing Memo.
11 at p.8. And the Government makes this assertion based on a statement made not by
12 the "titular" owners but by their daughter. One would expect that if the Government
13 were interested in learning what actually happened, it would ask the "titular" owners
14 themselves. But one would be wrong. While the Government deemed this
15 allegation important enough to include in the sentencing memorandum as grounds
16 for a heightened sentence, it didn't deem it important enough to confirm whether it
17 is true. And indeed it is not: *all of the sale documents on the property in question*
18 *are signed by none other than the "titular" owners* – the same ones the Government
19 claims were unaware of the sale.

20 The government also claims that Mr. Ketner took the money from the sales.
21 Again, this is wrong. Analysis of the records shows that Mr. Ketner did receive
22 reimbursement for hard costs he incurred while he managed the properties. Other
23 than that, he received nothing.

24 In short, the government's allegations of other misconduct should not be
25 relied upon.

26 **D. Mr. Ketner's Current Circumstances**

27 Although progress in such matters is rarely linear, it is significant that Ketner
28 has made great strides in acknowledging and addressing his impairments and

1 addictions. For instance, the PSR does not reveal that Dr. Brown has reported that
2 Ketner “has shown steady progress in his [addictive behavior] treatment.” (Balkan
3 Report, Ex. F at page 13.) Dr. Brown is a psychologist with a specialization in
4 addictive behavior, who is also a former Orange County Deputy Probation Officer
5 and a consultant with the State of California’s correctional system. As Dr. Brown
6 has reported,

7 “[Ketner] is sober for the first time in his adult life. I have been
8 impressed with his ability to talk openly about his involvement in a
9 criminal matter and his willingness to accept responsibility. In therapy,
10 he is learning the importance of sobriety in his life. I do not believe
11 that with his continuing involvement in treatment and the 12-Step
12 Program that Mr. Ketner would be at risk to reoffend.”

13 (*Id.*, page 13.)

14 In addition, Ketner has been meeting with addiction specialist Robert
15 Timmins. Timmins has worked in the field of addiction treatment for 35 years and
16 was a chief consultant in the establishment of the national drug court system. He
17 has managed Ketner’s recovery from alcoholism since July 13, 2006. Timmins
18 concluded in part that

19 “Based on my evaluation, I found Mr. Ketner to be amenable to
20 treatment and a good candidate for Alcoholics Anonymous Mr.
21 Ketner has been in compliance with all aspects of his treatment plan . . .
22 I have spent time with Mr. Ketner since he entered recovery and found
23 him to be genuine in his desire to change and stay sober.”

24 (*Id.*, pages 14-15.)

25 Ken’s AA sponsor since October 2006, Jim Cordwell, also has reported that
26 “Ken and I talk several times a week and he is attending multiple AA
27 meetings weekly. Ken understands that this battle is a life battle and
28

1 not a short-term war . . . I can assure you that Ken takes to the AA
 2 Program with dedication and rigorous sincerity. Having been active in
 3 AA for such a long time, I feel qualified to judge Ken in this important
 4 respect. Ken has and will win his battle.” (*Id.*, p. 15)

5 **E. Mr. Ketner’s Service To The Community, Friends, And Family**

6 Unfortunately, the PSR does not accurately reflect or report these sincere and
 7 legitimate efforts by Mr. Ketner nor does the PSR give sufficient credit to
 8 Mr. Ketner’s long term devotion to his family and community. This is also reported
 9 in some detail in the various letters written by family, friends and community
 10 representatives, as reported by Sheila Balkan in her report. (Balkan Report, pages
 11 15-22.) More recently, Mr. Ketner has dedicated extraordinary energy and time to
 12 the rebuilding of a neighborhood in New Orleans, severely damages by Hurricane
 13 Katrina. His participation in the Broadmoor Improvement Association has helped
 14 local New Orleans residents salvage an area of their city earmarked for complete
 15 elimination. Reverend Jerry Kramer, deeply involved in the Broadmoor rebuilding
 16 efforts, calls Mr. Ketner “invaluable to their team and their organization’s ability to
 17 move forward.” (*Id.*, pages 23-24). Kramer credits Mr. Ketner with spearheading
 18 an email and fundraising campaign necessary to support the Reverend’s work.

19 **F. Character Letters.**

20 The numerous letters attached to the Balkan Report reveal a dimension to
 21 Mr. Ketner’s character which is unexplored and unacknowledged by the
 22 government and PSR. The Reverend Jerry Kramer in New Orleans and the Senior
 23 Pastor of St. James Church in Newport Beach, Fr. Praveen Bunyan, reveal
 24 Mr. Ketner’s spiritual commitment to the general community. Each describes
 25 Mr. Ketner’s consistent convictions about and dedication to his church and religious
 26 beliefs. Fr. Bunyan attests to Mr. Ketner’s devotion to his wife and family. He also
 27 confirms Mr. Ketner’s longstanding contributions to others in need and especially
 28 those in New Orleans.

1 Others, like Albert Britcher and Debi Barish, know Mr. Ketner in personal,
2 business and professional contexts, attest to his positive, mentoring impact on their
3 lives. They also confirm that Mr. Ketner accepts responsibility for the actions and
4 inactions which led to his guilty plea.

5 Jim Cardwell is Ken's AA sponsor. Mr. Cardwell is a long-time real estate
6 professional and a sober member of AA for over 32 years. He has attested to Mr.
7 Ketner's commitment to remaining sober and to his family ties and devotion. As
8 Mr. Cardwell has said of Mr. Ketner, "I remember a few days after Ken pleaded
9 guilty to his participation in the crimes, his attitude was to seek help, not sorrow."
10 That attitude is reinforced regularly. As Mr. Cardwell also has said, "In October
11 (2006) . . . Ken asked me to be his sponsor in AA. We have been working together
12 since and Ken has expressed an extreme commitment to solve his problems. Ken
13 and I talk several times a week and he is attending AA meetings weekly. Ken
14 understands that this is a life battle and not a short-term war."

15 The letter of support from Mr. Ketner's wife, Cheryl, and his daughter,
16 Kristen, reveal the depth of devotion each has to Mr. Ketner. They do not hide from
17 Mr. Ketner's weakness, but more importantly, they reflect the fact that he has
18 always been a caring, loving man. That perspective is confirmed by the balance of
19 letters offered by personal friends, business associates, parishioners, and long time
20 friends of Mr. Ketner and his family. These testaments do not square with the
21 cynical, one-dimensional, skewed picture offered by the government. The narrow
22 perspective offered there reflects a superficial assessment and a lack of perspective
23 driven by self-serving conclusions rather than in-depth consideration of the nuanced
24 layers of Mr. Ketner's character.

25 **G. Mr. Ketner's Substantial Mitigation And Cooperation Efforts Since**
26 **MCR's Collapse.**

27 After the bankruptcy of MCR, Mr. Ketner assisted in providing helpful
28 information to the trustee of MCR, Richard Marshack and his attorney who in his

1 letter to the court dated September 14, 2006 stated: "Mr. Ketner proved to be a
2 valuable resource for the purposes of pursuit of claims against former employees
3 and affiliates of MCR. He made himself available for meetings and provided
4 information and documents that allowed the trustee to prosecute claims against and
5 defend against certain others." This effort shows Mr. Ketner's commitment to the
6 creditors of MCR. Claims or fear of a claim by the estate of MCR against former
7 employees of MCR tainted their statements to the government about Mr. Ketner and
8 his involvement.

9 Mr. Ketner has made several efforts to cooperate with the government in this
10 case and other ongoing crimes being perpetrated by former associates of MCR's.
11 Mr. Ketner's former attorney had expressed Mr. Ketner's desire to the government –
12 prior to his indictment on February 18, 2005 – that he would like the opportunity to
13 present the factual events of what happened at MCR. This request was denied and
14 the indictment that is before this Court was issued. During preparation for trial and
15 prior to entering his plea agreement, it was discovered that potential witnesses in the
16 Ketner case were involved in illegal or questionable actions. Just after Mr. Ketner's
17 plea agreement, he informed the government of two such actions. While no
18 promises of § 5K motions were made, Mr. Ketner was told that the information
19 would be accepted and reviewed. The information was collected and presented to
20 the FBI and has been called of "value" to its work.

21 III

22 SENTENCING ANALYSIS

23 Following the ruling in *United States v. Booker*, 543 U.S. 220, 245 (2005),
24 Sentencing Guideline calculations are no longer mandatory. Although sentencing
25 courts must still consider the advisory Guidelines range, "they are not required to
26 impose a sentence within [this] range." *United States v. Gonzalez-Huerta*, 403 F.3d
27 727, 731 (10th Cir. 2005). The advisory Guidelines range includes "applying a
28 'departure' as allowed by the Guidelines." *United States v. Mares*, 402 F.3d 511,

1 519 n.7 (5th Cir. 2005). However, the advisory Guidelines range is “but one factor
 2 among others to be considered at sentencing.” *United States v. Lopez-Flores*, 444
 3 F.3d 1218, 1220 (10th Cir. 2006). Consequently, after *Booker*, “a sentence, rather
 4 than having to comply with the Guidelines, must be reasonable.” *Lopez-Flores*, 444
 5 F.3d at 1220.

6 Once the advisory Guidelines sentence has been determined, the Court must
 7 consider other relevant facts and circumstances. In particular, pursuant to 18 U.S.C.
 8 § 3553(a), the Court must “impose a sentence sufficient, but not greater than
 9 necessary” to serve such needs as respect for the law, just punishment, deterrence,
 10 and protection of the public. After *Booker*, these § 3553(a) factors “have a new
 11 vitality in channeling the exercise of sentencing discretion.” *United States v.*
 12 *Trujillo-Terrazas*, 405 F.3d 814, 819 (10th Cir. 2005). Thus, for example, “[w]hile
 13 the guidelines discourage consideration of certain factors for downward departures,
 14 *Booker* frees courts to consider those factors as part of their analysis under
 15 § 3553(a).” *United States v. Andrews*, 447 F.3d 806, 812 (10th Cir. 2006). As a
 16 result, after *Booker*, “district courts now have more discretion to tailor sentences to
 17 the individual circumstances of a defendant.” *Trujillo-Terrazas*, 405 F.3d at 819.

18 **A. Sentencing Guidelines Calculation Per The Plea Agreement.**

19 The base offense level for the wire fraud count (Count 9 of the Indictment) is
 20 6. U.S.S.G. § 2F.1.1(a).⁹ Because the loss amount exceeds \$5,000,00, a 14-point
 21 enhancement applies. U.S.S.G. § 2F1.1(b)(1)(O). A two-point enhancement for
 22 more than minimal planning, U.S.S.G. § 2F1.1(b)(2)(A), and a three-point
 23 enhancement for a supervisory role, U.S.S.G. § 3B1.1(b), bring the offense subtotal
 24 for Count 9 to 25.

25
 26 ⁹ As reflected in the Plea Agreement, the government and Mr. Ketner’s counsel
 27 have agreed that the Sentencing Guidelines effective November 1, 1998 (the “1998
 28 Guidelines”) should govern this case.

1 Under the Sentencing Guidelines' grouping rules, the money laundering count
2 (Count 16 of the Indictment) is grouped with the wire fraud count, and a two-point
3 "grouping" upward adjustment applies, bringing the subtotal to 27. U.S.S.G.
4 § 3D1.4(a). A three-point downward adjustment for acceptance of responsibility
5 results in a Total Adjusted Offense Level of 24. See Plea Agreement at 8-9. The
6 government and Mr. Ketner have agreed that no other specific offense
7 characteristics, departures, or adjustments apply. *Id.* at 9.

8 As noted above, the PSR prepared by the Probation Office departs
9 significantly from this analysis and proposes using a higher Total Offense Level.
10 Mr. Ketner vigorously disagrees with the PSR's proposed alternative calculations,
11 which are at odds with the government's factual conclusions incorporated in the
12 Plea Agreement and also with the important and well-established facts of this case.
13 Mr. Ketner's objections to the PSR and demonstration of the PSR's flawed analysis
14 are set forth more fully in his Objections to the PSR and the attachments thereto,
15 filed with this Court on April 22, 2007. Mr. Ketner also will be filing a motion to
16 strike the myriad unreliable factual assertions contained in the PSR and the
17 Government's brief, which are derived almost entirely in conclusions extrapolated
18 from self-serving hearsay statements by co-defendants and co-conspirators. Basing
19 a sentencing decision on such unreliable matter would violate Mr. Ketner's due
20 process right to a fair sentence based on a reliable factual record. In the interest of
21 brevity and judicial economy Mr. Ketner will not repeat those detailed objections
22 here, but instead incorporates them by reference and requests that the Court review
23 and consider them before imposing sentence.

24 Mr. Ketner has no relevant criminal history placing him in Category I. Thus,
25 the guideline calculation results in a recommended range of 51-63 months in
26 zone C.

B. The PSR Ignores The Plea Agreement, Misconstrues The Facts, And Misapplies The Law.

In the PSR, the Probation Department inaccurately calculates the advisory guideline range in that it misapplies the provisions of the November 1, 1998, edition of the Guidelines manual. More specifically that the sentencing calculations set forth in the Plea Agreement are justified and appropriate. The PSR incorrectly assesses key facts and applies guideline sections which are inapposite, including the following:

First, virtually all of the evidence on this uncharged conduct is in the form of statements from co-defendants, or others who themselves were or could have been liable to prosecution for loan fraud in this same scheme and others. This type of evidence has been held to be too unreliable at sentencing even to carry the Government's burden of proof of a fact by a preponderance of the evidence. *See, United States v. Huckins*, 53 F.3d 276, 279 (9th Cir. 1995).

In the present case the statements the Government and the PSR rely upon appear to be no more reliable than those held to be unreliable as a matter of law in *United States v. Huckins, supra*. The statements at issue there:

"were not made under oath, nor at trial where the declarant could be cross-examined. Rather, his statements were made in the context of plea negotiations with the government in which Miller may very well have been hoping to curry favor with law enforcement officials by implicating his accomplice. *See Lee v. Illinois*, 476 U.S. 530, 546, 106 S.Ct. 2056, 2065, 90 L.Ed.2d 514 (1986) (reiterating 'the time honored teaching that a co-defendant's confession inculcating the accused is inherently unreliable.')." *United States v. Huckins, supra*, 53 F.3d at p. 279.

1 Like the statements in *Huckins*, the statements in the FBI 302's relied upon by
 2 the Probation Officer to increase the Guidelines score well above that agreed to by
 3 the Government in the plea agreement, are not subject to cross-examination. Nor
 4 are Mr. Ketner or his counsel aware of any circumstances that make the hearsay by
 5 these self-motivated potential co-defendants any more reliable than those statements
 6 considered totally and inherently unreliable in the cited case.

7 In addition, Mr. Ketner notes that at the time *Huckins* was decided, any
 8 hearsay of a co-conspirator that bears sufficient indicia of reliability could be
 9 admitted over a confrontation objection, under *Lilly v. Virginia*, 527 U.S. 116, 124-
 10 125 (1999), but *Lilly* has since been abrogated by the decision in *Crawford v.*
 11 *Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L.Ed. 2d 177 (2004). In *Crawford*,
 12 the Court held that "[t]estimonial statements of witnesses absent from trial have
 13 been admitted only where the declarant is unavailable and only where the defendant
 14 has had a prior opportunity to cross-examine." *See also, Bockting v. Bayer*, 399
 15 F.3d 1010 (2005) (applying *Crawford* retroactively).

16 **1. Contrary to the Government's Stipulation, the PSR Improperly**
 17 **Applies a Four-Level Increase Under 2F1.1(b)(7)(B) (Offense**
 18 **Affecting Financial Institution And Defendant Individually**
 19 **Received \$1 Million)**

20 The PSR argues that Mr. Ketner derived more than \$1 million in gross
 21 receipts from an offense affecting a financial institution and therefore imposes a four
 22 level enhancement under § 2F1.1(b)(7)(B). PSR ¶ 64. In reaching this conclusion,
 23 the PSR relies on the receipt of \$1.8 million into *MCR's account* ("Ketner received
 24 at least \$1.8 million into MCR's account from Johnson, funds Johnson acquired
 25 from Household. In addition, Ketner received at least \$266,215 in laundered funds
 26 (half of the \$526,430 deposited into the Heritage accounts.)" PSR ¶ 64).

27 The government disagrees with this adjustment. And this is for good reason.
 28 The Guidelines forbid attributing *MCR* funds to Mr. Ketner for purposes of Section

1 2F1.1. “The defendant derived more than \$1,000,000 in gross receipts from the
 2 offense” means that the gross receipts “*to the defendant individually, rather than to*
 3 *all participants*, exceeded \$1,000,000.” U.S.S.G. § 2F1.1(b)(7)(B), Appl. Note 18
 4 (emphasis supplied). In other words, *only money Mr. Ketner actually received is*
 5 *counted towards the \$1 million.*

6 Case law similarly forbids applying this adjustment to an individual defendant
 7 when the funds were received by a corporation rather than the individual defendant.
 8 See *United States v. Colton*, 231 F.3d 890 (4th Cir. 2000); *United States v.*
 9 *Castellano*, 349 F.3d 483 (7th Cir. 2003); *United States v. Bortnick*, 2006 WL
 10 680544 (E.D. Pa. 2006); cf. *United States v. Millar*, 79 F.3d 338 (2d Cir. 1996)
 11 (funds held by one individual co-defendant do not count against other individual co-
 12 defendant).

13 In *Colton*, for example, the defendant and his partner used their corporate
 14 entity to unlawfully obtain over \$2 million. Thereafter the defendant and his partner
 15 each received \$300,000 from the corporation out of these funds, but the remainder
 16 was used to satisfy the corporation’s obligations along with corporate obligations
 17 incurred by other entities run by the defendant and his partner. The district court
 18 ruled that this adjustment did not apply because the defendant himself received only
 19 \$300,000. On appeal, the government argued this was error because § 2F1.1 defines
 20 “gross receipts” as those received “directly or indirectly.” Seizing on this
 21 terminology, the government maintained that the defendant *indirectly* received half
 22 of the \$2 million. The Court of Appeals for the Fourth Circuit rejected this
 23 argument and affirmed the lower court because there was no indirect receipt through
 24 the corporation. See *Colton*, 231 F.3d at 910-12; see also *Castellano*, 349 F.3d at
 25 486-87 (holding that founder and principal manager of corporation does not
 26 individually receive money entering corporate coffers); *Bortnick*, 2006 WL 680544
 27 at *3-4 (holding that president and part owner of corporations does not individually
 28 receive money deposited into corporations’ accounts).

1 The plain language of § 2F1.1 and Application Note 18, as well as the
 2 relevant case law, mandate that the \$1.8 million that *MCR* received into its account
 3 does not factor into the calculation of Mr. Ketner's *individual* "gross receipts" under
 4 § 2F1.1. The government recognized this when it stipulated that this adjustment
 5 does not apply here and the PSR should recognize this as well. This adjustment
 6 does not apply here.¹⁰

7 In addition, the PSR does not take into account the bank records which clearly
 8 reflect that Mr. Ketner did not benefit from the \$266,215 received from Johnson. In
 9 fact, \$135,000 of that was returned to the MCR operating account and, therefore,
 10 Mr. Ketner only benefited from \$131,819.58 from the "sharing" arrangement with
 11 Johnson. (Exh. 2, Laffer Report, pp. 40-41; Laffer Exhibit 74.)

12 **2. Contrary to the Government's Stipulation, the PSR Improperly**
 13 **Applies a Four-Level Increase Under § 3B1.1(a)**
 14 **(Organizer/Leader).**

15 After investigating this matter for several years, after interviewing witnesses
 16 and taking testimony, the government concluded that Mr. Ketner deserves a three-
 17 level upward adjustment for role in the offense. The government also agreed that
 18 Mr. Ketner *does not deserve* a four-level upward adjustment.

19 Though the PSR makes clear that its conclusions are not based on any
 20 information other than that provided by the government, the PSR comes to a
 21 conclusion the government disputes, namely that Mr. Ketner deserves a four-level
 22 adjustment. (PSR, ¶¶ 68-68.) The PSR bases its conclusion on a rhetorical

23
 24 ¹⁰ In her May 14, 2007 "Second Addendum To The Presentence Report," the
 25 Probation Officer simply ignores the Application Notes and case law cited here – all
 26 of which was set forth in Mr. Ketner's April 24, 2007 objections to the prior version
 27 of the PSR. Rather than addressing this compelling legal authority, the Probation
 28 Officer simply repeats her bare conclusions, which are unsupported by any legal
 authority.

1 question, “if Ketner is not the leader, than who is[?]” (PSR, ¶ 66.) But not every
2 scheme has a single leader. As discussed above, the underlying losses resulted from
3 the deceitful actions and supervision of several people and were simply not the end
4 result of the long term, preconceived scheme as envisioned by the PSR.

5 The PSR also considers the factors set out in the application notes regarding
6 role in the offense. But these do not support the PSR’s conclusion either. For
7 example, while exercise of decision-making authority is a factor, it is clear that
8 others, such as Mr. Benicosa, had at least as much authority as Mr. Ketner when it
9 came to MCR’s finances. *Indeed, Mr. Ketner did not even sign any of MCR’s*
10 *checks and he had no wire authority.* Instead, Mr. Benicosa controlled these things.
11 Likewise, the nature of Mr. Ketner’s participation in the commission of the offense
12 was not different from Mr. Bristol’s, for example. There is no evidence that
13 Mr. Ketner claimed or received a larger share of the proceeds than Mr. Bristol;
14 indeed, Mr. Bristol received more than Mr. Ketner.

15 In short, while the PSR lists a number of factors to be considered, it does not
16 actually determine whether any of these factors should apply here. Instead, it
17 simply states that Mr. Ketner was in charge of MCR and was involved in the
18 offenses. Of course, no one disputes that Mr. Ketner played a prominent role at
19 MCR. But this is the wrong question. The proper question is whether Mr. Ketner
20 was significantly *more* involved than the others and whether he “led” them in the
21 offense. Even the PSR indicates that he did not, noting as it does that Mr. Ketner
22 “along with Bristol and Johnson” defrauded the warehouse lenders. In fact, it was
23 Mr. Benicosa and Mr. Bristol – not Mr. Ketner – who engaged in most of the wide-
24 ranging misconduct that led to MCR’s collapse.

25 In short, when the PSR gave Mr. Ketner a four-level adjustment, the PSR
26 assumed its own conclusion. The government’s agreement that this is wrong should
27 carry heavy weight here. As the government stipulated, a proper understanding of
28 the facts reveals that Mr. Ketner should not receive this four-level adjustment.

3. The PSR's Calculation Of The Amount Of Loss Is Without Sufficient Basis, Is Contrary To Government's Position, And Is Wrong.

The PSR's conclusion on loss (PSR, ¶¶ 35-39, 62; Letter to Judge Selna, p.1) is significantly different from the government's. Moreover, the PSR's conclusion is not well-founded. For example, the PSR states that the General Counsel of Republic Bank "indicated to the SA that Ketner had a \$15 million line of credit with Republic Bank, approximately half of which had been recovered. Republic Bank then estimated an expected loss of several million dollars." PSR ¶ 36. Apart from the third-hand nature of this representation, what this means is entirely unclear: If Republic recovered half of a \$15 million credit line, why would the loss be only "several million dollars?" And why would the then AUSA indicate, contrary to the stipulation he signed, that the loss was \$1.5 million? *Id.* ¶ 37.

The point here is not to debate the precise number. It is more fundamental than that. Whatever the number is, it needs to have some basis. And none of the numbers in the PSR has any basis that can be used to test its validity. Indeed the numbers provided don't even agree with each other.

4. Contrary to the Government's Stipulation, the PSR Improperly Applies a Two-Level Increase Under § 3B1.3 (Abuse of Trust).

The PSR argues that Mr. Ketner deserves a two level adjustment for abusing a position of trust with the warehouse lenders. PSR ¶ 68. But this contradicts even the government's understanding of events and, moreover, is inconsistent with the Guidelines.

The PSR says that "it was [the] abuse of [Mr. Ketner's] position with the warehouse lenders that allowed for the commission of the offense." But whether Mr. Ketner's position enabled him to commit the offense is the wrong inquiry under § 3B1.3. As the Application Notes to § 3B1.3 make clear, "position of trust" for purposes of this adjustment does not mean a position that made the crime possible.

1 It does not mean access. Instead, it means a position that entails a high level of
2 discretion on the part of the defendant.

3 Specifically, Application Note 1 states:

4 “Public or private trust” refers to a position of public or private trust
5 characterized by professional or managerial *discretion* (*i.e.*, substantial
6 discretionary judgment that is ordinarily given considerable deference).
7 Persons holding such positions ordinarily are subject to significantly
8 less supervision than employees whose responsibilities are primarily
9 non-discretionary in nature. For this adjustment to apply, the position
10 of public or private trust must have contributed in some significant way
11 to facilitating the commission or concealment of the offense (*e.g.*, by
12 making the detection of the offense or the defendant’s responsibility for
13 the offense more difficult). This adjustment, for example, applies in
14 the case of an embezzlement of a client’s funds by an attorney serving
15 as a guardian, a bank executive’s fraudulent loan scheme, or the
16 criminal sexual abuse of a patient by a physician under the guise of an
17 examination. This adjustment does not apply in the case of an
18 embezzlement or theft by an ordinary bank teller or hotel clerk because
19 such positions are not characterized by the above-described factors.”

20 Even on its face, this makes clear that the government was right when it
21 concluded that abuse of trust does not apply. Indeed, as alleged in the PSR itself,
22 the loan money at issue was supposed to have been distributed directly by Johnson
23 & Payne and not MCR. If so, Mr. Ketner could not have had any position of trust in
24 regards to that money – if he improperly took control of the money, by definition he
25 did not enjoy a position of trust relative to the warehouse bank victims.

26 Moreover, even if Mr. Ketner did have authorization to distribute the funds
27 here, he would still not be in a position of trust for purposes of this adjustment. As
28 the application notes make clear, discretion, not access, is the hallmark of abuse of

1 trust. The misconduct alleged here is that mortgage money from one borrower was
 2 used to pay another borrower's loan. In other words, the whole point is that
 3 Mr. Ketner *had no discretion*. He was no different from a bank teller who has
 4 access to money but no discretion about what to do with it. And as the Application
 5 Notes make clear, access does not equal a position of trust. Instead, "discretion
 6 must be entrusted to the defendant by the victim." *United States v. Broderson*, 67
 7 F.3d 452, 455-56 (2d Cir. 1995). No such discretion was entrusted to MCR or Mr.
 8 Ketner by the warehouse lenders. Even the PSR recognizes that, pursuant to the
 9 terms of their commercial transactions, the warehouse lenders' agreements which
 10 were ignored, carefully restricted MCR's and Mr. Ketner's discretion: (1) they
 11 permitted MCR to make loans on their behalf only if the loans met their specified
 12 requirements; and (2) they required that a closing agent, not MCR, fund the loans.¹¹
 13 In other words, Mr. Ketner did take advantage of a "position of trust," but rather
 14 acted openly and with the lenders' knowledge.

15 This conclusion is not undermined by the fact that MCR and Mr. Ketner
 16 managed to redirect the warehouse lenders' funds to MCR despite the warehouse
 17 lenders intentions:

18 That [the defendant's] illegal activities frustrated [the victims']
 19 oversight by corrupting various checks on his performance does not
 20 mean that he held a position that his victims intended to be immune
 21 from oversight and control; indeed it appears that he held a position
 22 with certain checks in place to confirm his compliance with the law and
 23 the contract, but that his illegal actions undermined these checks.

24 *United States v. Thorn*, 317 F.3d 107, 121-22 (2d Cir. 2003).

25
 26
 27 ¹¹ As noted earlier, at least some bank employees were aware that MCR was
 28 funding the loans.

1 Even according to the PSR, Mr. Ketner was never supposed to be and never
2 was in a position "immune from oversight and control" relative to the mortgage
3 money. If so, as the government correctly concluded, the abuse of trust adjustment
4 does not apply.

5 IV
6 CONCLUSION

7 For all of the foregoing reasons, Mr. Ketner respectfully urges the Court to
8 apply the Guidelines analysis employed by Mr. Ketner in this Memorandum and by
9 the government in the Plea Agreement, and to take careful account of the additional
10 relevant facts discussed in this Memorandum, Mr. Ketner's Objections to the PSR,
11 and the attachments to those documents.

12 As noted, the government investigated the case for almost five years before
13 charging Mr. Ketner. And between the charges and the plea, Mr. Ketner and his
14 lawyers met with the government many times to discuss (and debate) the facts and
15 the applicable laws. After this intense process, the parties that knew the most about
16 the case, namely the government and Mr. Ketner, reached a very detailed plea
17 agreement. While that agreement does not bind the Probation Office and certainly
18 cannot bind the Court, it should at least carry weight regarding the factors at issue
19 here. If the government concluded, for example, that Mr. Ketner deserves a 3-level
20 adjustment for role in the offense, it is safe to assume that the government, after
21 much investigation, concluded that this fairly reflects what happened. It is not just
22 Mr. Ketner who is asserting those positions.

23 The PSR's repeated assertion of unproven facts and its reliance on those facts
24 to significantly increase the sentence is very troubling. As noted earlier, at some
25 point the increase becomes so significant that the defendant becomes entitled to
26 have it based on proper evidence, not just hearsay or speculation. No such quality
27 evidence supporting the increase has been adduced in this case. In short, Mr. Ketner
28 respectfully urges the Court to apply the Sentencing Guidelines calculations and

1 factors agreed upon by Mr. Ketner and the government.

2 This case has been a long journey for all involved. In the course of it, Mr.
3 Ketner learned a lot about his responsibilities as a member of society and he also
4 learned a lot about himself. Mr. Ketner recognizes that he must pay society a price
5 for his crimes and he also recognizes that his addictions and conditions cannot be
6 ignored. He has actively sought help to deal with these issues so that he can try to
7 rebuild his life after this is over. He has made great progress in that area and he,
8 along with his doctors, is optimistic about the future.

9 Mr. Ketner made terrible choices. He admits this and he knows he must face
10 the consequences of his choices. His guilty plea and his work with the doctors and
11 counselors discussed above are evidence of this and these are the first steps in his
12 effort to rebuild his life on a proper foundation. In light of all of this, Mr. Ketner
13 respectfully requests that he be sentenced at the low end of the range agreed to by
14 the government in the Plea Agreement.¹²

15 Mr. Ketner respectfully suggests that the actual facts – as established by
16 reliable evidence – warrant a sentence of the low end of the Guideline range.

17 DATED: June 22, 2007

Terry W. Bird
Jason D. Kogan
John M. McCoy III
BIRD, MARELLA, BOXER, WOLPERT,
NESSIM, DROOKS & LINCENBERG, P.C.

22 By: /s/

Terry W. Bird
Attorneys for Defendant Kenneth Ketner

25 _____
26 ¹² When the Probation Officer wrote her last comments on the 7 year
27 recommendation, she acknowledges that there should be a downward adjustment
28 based on relevant facts.